No. 5815

United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM L. PAUL,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellee's Brief on Motion to Dismiss Appeal and on the Merits.

Upon Appeal From the United States District Court For the Territory of Alaska, Division No. One.

HOWARD D. STABLER,
United States Attorney,
For Appellee.

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STATEMENT OF THE CASE.

On March 4, 1929, at Ketchikan, Alaska, District Judge Justin W. Harding summarily adjudged the appellant William L. Paul in contempt of court, committed in the presence of the court, in two particulars, or counts, on the first whereof appellant was fined $75.00; and on the second, $100.00. Each sentence provided for appellant's imprisonment until such fines were paid, on the first not exceeding 35 days; on the second not exceeding 50 days.

Stay of proceedings pending appeal was granted by the trial court on the above date at appellant's request.

Appellant perfected his appeal to this court, and thereafter appellee filed its motion to dismiss the appeal for want of appellate jurisdiction. The motion to dismiss is hereinafter quoted.

The plan of appellee's brief is, first, a presentation of the motion to dismiss the appeal; and, second, a presentation of facts and arguments on the merits.

THE MOTION TO DISMISS THE APPEAL.

The Motion to Dismiss, duly served and noticed upon appellant's attorneys, is as follows:

> "Comes now United States of America, appellee in the above entitled court and cause, by Howard D. Stabler, United States Attorney for the First Division, District of Alaska, and by virtue of the provisions of the third subdivision of section 128 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 936, 28 USCA 225, U. S. Comp. Stat. section 1120, amended, respectfully moves the Court to dismiss for want of appellate jurisdiction the above entitled pretended appeal of William L. Paul from the final judgment and decision of the District Court for the First Division, District of Alaska, for the reason that the Constitution of the United States, nor any statute or treaty of the United States or any authority exercised thereunder, is not involved; the value in controversy exclusive of interest and costs does not exceed one thousand ($1000.00) Dollars; the offense charged is not punishable by imprisonment for a term exceed-

ing one year or by death; and said proceeding is not a habeas corpus proceeding."

ARGUMENT ON MOTION TO DISMISS.

Appellate jurisdiction in Alaskan matters is governed by the provisions of the Act of February 13, 1925, cited in the motion, the pertinent parts whereof are as follows:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions,—
>
> "Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs exceeds $1000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death and in all habeas corpus proceedings. . . ."

In 1927, this court in the case of Starklof v. United States, 20 Fed. (2d) 32, under the authority of the statute just quoted, dismissed a writ of error from Alaska for want of jurisdiction upon a motion identical in form and substance with the present motion to dismiss. In the Starklof case, the appellant contended among other things that a statute of the United States was involved, and, therefore, the court had appellate jurisdiction. In the present case, appellant contends that the court has appellate jurisdiction because a Constitutional ques-

tion is involved. This last statement is based upon the following references: On page 2 of appellant's brief is the statement, "The appeal comes to this court on Constitutional grounds". See also appellant's brief page 69; and his assignment of errors number one, transcript page 90.

It appears that this case is not appealable under the Act of February 13, 1925, unless the Constitution of the United States is involved, for the statutes upon which the contempt proceedings are based are not statutes of the United States (sections 1441-1455, Compiled Laws of Alaska, which, according to the authority of the Starklof Case, are laws of the Territory and not laws of the United States); no treaty is involved; the value in controversy does not exceed $1000; the offense charged is not punishable by imprisonment for a term exceeding one year or by death; and it is not a habeas corpus proceeding.

As this court has appellate jurisdiction to review this case only in the event the Constitution is involved, it follows that the appeal ought to be dismissed for want of jurisdiction if the Constitution is not involved.

The words, "Constitution is involved", found in the Act of February 13, 1925, have been used in other statutes; and have often been construed by the courts.

Federal appellate procedure in Alaskan cases (Compiled Laws of Alaska section 1336, Comp St.

1224) prior to the Act of February 13, 1925, provided for direct appeal and error to the Supreme Court,

> " . . . in all cases which involve the construction or application of the Constitution of the United States. . . ."

Direct appeal from the district courts to the Supreme Court prior to the Act of February 13, 1925, was also provided for (Comp. St. 1215, Jud. Code section 238 as amended, Act Jan. 28, 1915),

> " . . . in all cases that involve the construction or application of the Constitution of the United States. . . ."

A study of some of the Supreme Court decisions construing the meaning of the words, "in all cases which involve the construction or application of the Constitution of the United States", leaves little doubt of what Congress intended in the Act of February 13, 1925, by the words, "in all cases, civil and criminal, wherein the Constitution . . . is involved".

The record clearly shows that in the contempt case against appellant there was no issue of fact or law, substantial or otherwise, before the trial court involving the Constitution or a Constitutional question; and, therefore, the court below did not pass upon or consider an issue of that character. It was not until after the order adjudging appellant's contempt was made that any references to the Constitution were presented in the case. These references are contained in the assignment of errors and in ap-

pellant's brief, made for the purpose of appeal. According to the authorities, the facts and record of this case do not present a situation wherein the "Constitution is involved".

In Sugarman v. U. S. 249 U. S. 182, 39 Sup. Ct. 191, the Supreme Court of the United States said:

> "Mere reference to a provision of the federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below."

In Ansbro v. United States, 159 U. S. 695, 16 Sup. Ct. 187, the Supreme Court of the United States by Mr. Chief Justice Fuller said:

> "The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case that involves the construction or application of the Constitution of the United States, or in which the constutionality of any law of the United States is drawn in question." . . .
>
> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the records before the judgment of the court below can be revised, on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason.
>
> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court

below, and rulings asked thereon, so as to give jurisdiction to this court."

In the case of Itow v. United States, 233 U. S. 581, 34 Sup. Ct. 699, the Supreme Court of the United States dismissed for want of jurisdiction a direct appeal from Alaska. Mr. Chief Justice White delivered the opinion of the court which cited and followed the Ansbro case, ante, and said:

" . . . But in the light of the settled rule which we have stated (quoting from the Ansbro case) it is apparent on the face of the record that the assignments are wholly inadequate to give us the power to directly review, since there is nothing whatever directly or indirectly even intimating that the reliance on the Constitution was stated at the trial below in any form . . . .

"But the latter conception overlooks the conclusively settled rule to which we have referred that the power to directly review because of a Constitutional question obtains only where such question was involved in the trial court; that is, was there actually raised.

" . . . The destructive effect on the distribution of judicial power made by the Act of 1891 which would result from holding that jurisdiction to directly review obtained in any case because of a Constitutional question, irrespective of the making of such question in the trial court, merely because of the possibility, after completion of the trial below, of suggesting for the first time, such question as the foundation for resorting to direct review, is apparent and finds apt illustration in this case. Thus, although the accused made no objection, constitutional or otherwise, to the permission given by the court to the jury to separate, and indeed expressly assented to such separation,

> yet, as one of the grounds for direct review by this court it is insisted that, as the Constitution guaranteed a jury trial according to the course of the common law, and permission to separate could not be granted under that law, therefore the accused was deprived of a constitutional right. . . . ."
>
> "Dismissed for want of jurisdiction."

See also: State of Arkansas, et al. v. Schlierholz, 178 U. S. 598, 21 Sup. Ct. 229, 231; Goodrich v. Ferris, et al., 214 U. S. 71, 29 Sup. Ct. 580, 583; 25 Corpus Juris 913, section 263.

The record in the case before the court does not present any constitutional question for review, since it fails to disclose any controversy on such subject properly raised in the court below. The assignment of errors cannot be availed of to import constitutional questions into the cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court on the theory that the Constitution is involved.

It appearing that the Constitution is not involved in this case, it is respectfully urged, therefore, that the motion to dismiss should be granted and the appeal dismissed for want of jurisdiction.

ARGUMENT ON THE MERITS.

Careful study of appellant's argument indicates that he relies upon the proposition that the court did not have jurisdiction to try appellant summarily, and to make the order reciting contempt and

imposing the sentence because, according to appellant, there was no contempt of court; and, if there was contempt of court, it was not direct contempt in the presence of the court but constructive contempt not in the presence of the court, which could only be tried by affidavit, and show cause or arrest to bring appellant before the court.

Appellant cannot very well rely upon any other proposition than that the court did not have jurisdiction, for the record in this case, hereinafter more particularly referred to, clearly shows that appellant made no objection, nor did he reserve any exception to any act or ruling of the court. On this point, the authors of 13 Corpus Juris (Contempt) 102, section 165, say:

> "As a general rule (in contempt cases) questions not raised in the trial court, excepting the question of the jurisdiction of the court, will not be considered by the reviewing court."

Some of the argument advanced by appellant in support of his point that there was no contempt apparently challenges the truth of facts in the order reciting contempt. But, as stated by the Supreme Court of the United States in the case of In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 81:

> "Necessarily there can be no inquiry de novo in another court (in direct contempt) as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, no issue upon which there can be a trial."

It is believed by appellee that the fact of whether there was direct contempt of court in the presence

of the court must be determined from the provisions of section 1443 Compiled Laws of Alaska defining the procedure in direct contempts; from the face of the record, and particularly from the order reciting contempt; and from the provisions of section 1441 (3 and 1), Compiled Laws of Alaska, defining contempts.

Section 1443, Compiled Laws of Alaska, defines the procedure in direct contempts. This statute is declaratory of the common law on the same subject (4 Bl. Comm. 286, cited in In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77), and is as follows:

> "When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. In other cases of contempt the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him, but such trial shall be by the court, or, in the discretion of the court, upon application of the accused, a trial by jury may be had as in any criminal case."

In direct contempts, either at common law, or under the provisions of section 1443, the offender may be instantly apprehended and imprisoned in the discretion of the court without any further proof or examination; without trial or issue, and without other proof than its actual knowledge of what occurred. 4 Bl. Comm. 286, cited in In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77.

The order reciting the contempt (p. 40 trans.) shows on its face that appellant was summarily tried and sentenced, without jury trial, for direct contempt, committed in the presence of the court, in accordance with the provisions of section 1443, ante.

From the face of the record, which shows no objections or exceptions to any act or ruling of the court, we are to determine whether the court had jurisdiction to punish appellant summarily for direct contempt of court committed in the presence of the court.

The record in this case as viewed by appellee is the order reciting contempt (pp. 40, 51, trans.), and such other documents or instruments as have been incorporated in the order by reference, which include: the petition for writ of review (p. 51, trans.), referred to as exhibit 1 (p. 40, trans.); a letter written by appellant to the court (pp. 54, 55, trans.), referred to as exhibit 2 (pp. 40, 41, trans.); the testimony of Maxfield Dalton (pp. 55, 70, trans.), referred to as exhibit 3 (p. 43, trans.); the testimony of Mrs. William L. Paul (pp. 70-79, trans.), referred to as exhibit 4 (p. 43, trans.); the testimony of William L. Paul, appellant (pp. 79-84, trans.), referred to as exhibit 5 (p. 44, trans.); an affidavit of prejudice (pp. 84-87, trans.), referred to as exhibit 6 (p. 50, trans.); and the record of the proceeding shown in the transcript pages 1-8.

The record shows, in substance and effect, that at 2:10 P. M., February 23, 1929, (p. 2, trans.), the

district court for the First Division of Alaska, at Ketchikan, Alaska, Judge Harding on the bench, was in regular session, at which time and place appellant appeared before the court, in open court, in the immediate view and presence of the court, in behalf of a certain petition for writ of review, which he personally theretofore had made, signed, certified and filed in said court and cause, and moved to continue the hearing on the petition then before the court for the purpose of amending it by changing some of the language (p. 2, trans.); whereupon, the court requested a statement from appellant (p. 3, trans.) as to what was his basis for alleging certain matter in the petition under oath as an attorney (p. 4, trans.) which, as stated by the court, (pp. 4, 6, trans.), was known by the court to be incorrect and untrue. The court then adjourned temporarily at appellant's request to enable appellant to secure certain correspondence. At 2:45 P. M., appellant (p. 8, trans.) announced that he was ready to proceed, whereupon the testimony of Maxfield Dalton, the petitioner for the Writ of Review, was taken and he was cross examined by appellant. Appellant then voluntarily made a statement to the court in his own behalf—he was not cross examined; and he was granted permission to call, and he did call, a witness in his own behalf (p. 30, trans.). The court took the matter under advisement, and granted the appellant permission to file an amended complaint. Thereafter, on February 25, 1929, the objectionable Affidavit of Prejudice (p. 84, trans.) came before

the court. On March 4, 1929, the court in open court pronounced the Order Reciting Contempt committed by appellant on February 23, 1929, (p. 40, trans.). This delay in making the order did not affect its validity. On this point the Supreme Court in the case of In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 82, said:

> "Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment."

It appears from the record that the written petition containing the alleged contemptuous matter regularly came up for hearing before Judge Harding on February 23, 1929, in open court at a regular session of the court. The appellant was before the court presenting the written petition. The fact of the objectionable language of the petition and affidavit of prejudice being in writing when presented before the court is no less in the immediate view and presence of the court than had it been spoken to the court.

In Hughes v. Peo. 5 Colo. 436, 450, an affidavit for a change of judges was presented to the court while in session by respondent's attorney, respondent, himself an attorney, being absent. Upon contempt proceedings against the affiant, the Supreme Court of Colorado, said:

> "It was in the face of the court, and warranted the judge in taking cognizance of it summarily as though the words, instead of being written, and read in court, had been spoken in facie curiae by the plaintiff in error appearing in his proper person."

The court appeared to know of his own knowledge the fact of the incorrectness and falsity of the allegations in the petition. The record does not show how the court knew these facts; but it does show that the court on February 23d, did know the incorrectness and falsity of the allegations of the petition while it was before him in open court for hearing. Apparently, as far as the record discloses, the judge became immediately cognizant of it as it was being presented before him. The court may have been familiar with the case of Ex Parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 702, wherein the Supreme Court of the United States said:

> "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of an attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which

> the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

The contempt alleged in the first count of the Order Reciting Contempt is based upon section 1441, subdivision 3, Compiled Laws of Alaska, which provides:

> "The following acts or omissions in respect to a court of justice or proceedings therein are deemed to be contempts of the authority of the court: . . . Third, Misbehavior in office or other willful neglect or violation of duty by an attorney. . . ."

The first count of the order and record shows, in substance and effect, that on February 23, 1929, appellant, an attorney of the court, in open court, in the immediate view and presence of the court, upon the hearing of a matter pending before the court, to wit, the aforesaid proceeding for a Writ of Review, willfully, knowingly, purposely, intentionally and fraudulently, and in violation of his duty of being honest, fair and truthful to the court misbehaved in such office and capacity and violated his duty as such attorney by personally and in person making, signing, certifying and filing in said court in said proceeding, and by presenting the same to the court in open court, in the immediate view and presence of the court, when the same came on for hearing, a petition containing certain matters which appellant knew to be fictitious, false and untrue, and which were known to the court to be incorrect and untrue (pp. 4, 6, trans.), for the fraudulent in-

tent and purpose of deceiving the court and thereby obtaining of and from the court a process known as a Writ of Review.

The contempt alleged in the second count of the Order is based upon section 1441 also, but upon the first subdivision thereof, which provides:

> "The following acts or omissions, in respect to a court of justice or proceedings therein are deemed to be contempts of the authority of the court. First. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding."

The second count of the order, and the record, shows in substance and effect that on February 23, 1929, said petition for Writ of Review, theretofore personally and in person, made, certified, signed and filed in said court and cause by appellant, came on for hearing in open court, in the immediate view and presence of the court while holding the court in said proceeding; that appellant moved to continue the hearing for the purpose of amending said petition by changing some of the language; that certain allegations of the petition, referring to the judge of the court, were knowingly fictitious, false and untrue and known by the court to be incorrect and untrue (pp. 4, 6, trans.) and made by appellant in contemptuous and insolent disregard for the judge of said court, and made with the intent and for the purpose of discrediting and embarrassing said judge in his official

capacity and official functions and in his administration of said court, all tending to impair the authority of the court; and that appellant filed in said proceeding for Writ of Review an affidavit of prejudice containing allegations unnecessary to obtain the relief requested, which allegations reflected upon the integrity of the judge of the court, and were knowingly false and untrue and made with the intent and purpose of further discrediting and embarrassing the judge in his official capacity as judge of said court, and in his official functions and administration of said court; and impairing the authority, honor and dignity of the court and the judge thereof.

It is respectfully contended, therefore, that the facts as shown in the record and count one of the order reciting contempt constitute contempt of court in the presence of the court as defined in section 1443, and in section 1441 (3), ante; and that the facts as shown in the record and count two of the order reciting contempt constitute contempt of court in the presence of the court as defined in section 1443, and in section 1441 (1), ante; and, therefore, the court had jurisdiction to punish appellant summarily for direct contempt of court committed in the presence of the court, without trial or issue, and without other proof than its actual knowledge of what occurred.

Appellant's brief (page 66) refers to appellant's attempt to amend the petition and apologize to the court, and states that "Mr. Paul had no intention to

insult Judge Harding in the statements in the petition or otherwise". But, contempt of court is not dependent upon intention. In the case of Hughes v. The People, 5 Colo. 436, 453, the Supreme Court of Colorado said:

> "Nor is the contempt purged by an avowal that no contempt was intended. The question of contempt does not depend on intention, although, where the contempt was intended, this is an aggravating feature, which goes to the gravamen of the offense."

Reference is also made in appellant's brief to a jury trial by virtue of chapter 22, section 2, of the Session Laws of Alaska for 1925 (pp. 20-21 brief); but, assuming that the territorial act is valid, it clearly appears that its provisions do not apply to direct contempts, but only to contempts not committed in the presence of the court.

Some argument is made (pp. 88-89 brief) by appellant to the effect that Judge Harding was disqualified in this matter. This point was before the Supreme Court of California in the case of Lambertson v. Tulare County Superior Court, 11 LRA (NS) 619, 622, where it was said:

> "Nor is the judge disqualified from sitting in the contempt proceedings. Petitioner's theory in this regard, if we understand it, is that the judge is disqualified from hearing the proceedings in contempt, because the contempt itself consists in imputations upon his motives and attacks upon his integrity. Such is not and never has been the law. The position of a judge in such a case is undoubtedly a most delicate one, but his duty is none the less plain, and

that duty commands that he shall proceed. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides."

CONCLUSION.

It is respectfully submitted, therefore, that this appeal ought to be dismissed for want of appellate jurisdiction; or the judgment of the trial court sustained on the merits.

Respectfully submitted,

HOWARD D. STABLER,
United States Attorney.